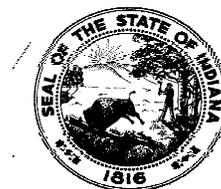


Indiana Board of Special Education Appeals



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BEFORE THE INDIANA BOARD OF SPECIAL EDUCATION APPEALS

In the Matter of D.S. and the Lakeland School Corporation and the Northeast Indiana Special Education Cooperative)
) **Article 7 Hearing No. 1063-98**
)

PROCEDURAL HISTORY OF THE DUE PROCESS HEARING

The Student and his father, by counsel, requested a due process hearing due to a disagreement with the case conference committee determination that the Student's behavior was not causally related to the Student's disability. The parent's request for an expedited hearing was received by the Indiana Department of Education (IDOE) on October 2, 1998. The Independent Hearing Officer (IHO) was appointed on October 5, 1998. A prehearing conference was held by telephone on October 8, 1998. The IHO ordered that formal expulsion proceedings were stayed during the pending of the Article 7 due process proceedings (pursuant to Article 7). A hearing date of October 21, 1998 was established. The parties stipulated they would exchange evidence by October 16, 1998. The issues to be addressed at the hearing were determined to be as follows:

1. Whether the school properly conducted a review of the relationship between the Student's disability and the behavior subject to the disciplinary action (manifestation determination review).
2. Whether the school denied the Student due process of law in connection with the manifestation determination review by failing to effectively allow the parent to participate in the review.

A second prehearing conference was held just prior to the start of the hearing on October 21, 1998. At that time, the parties stipulated to the admission of all but one exhibit. During the course of the hearing, the school withdrew its objection to the parent's exhibit 19, and all exhibits were admitted. At the election of the parent, the hearing was open to the public.

The IHO issued his written decision on November 10, 1998. The IHO found the Student to be fourteen years old and in the ninth grade. The Student has a learning disability in the written language area and is eligible for special education and related services. The Student attends general education classes with one period per day of support provided in a resource room. The Student resides with his mother. The mother is the custodial parent for notice purposes and has been active in the Student's schooling. The father has been provided notice by the mother throughout the Student's schooling.

The Student's individualized education program (IEP) was written on March 18, 1998. Neither parent objected to the IEP. On August 28, 1998, the director of student activities

investigated a student report concerning the possession and consumption of alcohol on school premises. The Student was implicated in the incident and was alleged to have taken at least two drinks of alcohol from a root beer bottle. After conducting a preliminary investigation, the director of student activities suspended the Student for four days pending a manifestation determination wherein a case conference committee would determine if there was a causal relationship between the Student's alleged misconduct and his disability. The director of student activities requested from the superintendent that the Student be expelled for the remainder of the semester.

On August 28, 1998, the Student's mother was notified by telephone that the Student was being suspended and would be expelled for taking a couple of drinks of alcohol from a root beer bottle at school. The director of student activities also met with the Student's father on that day and informed him the Student was being suspended for possessing, using or distributing alcohol. During this meeting, the Student's father related another disciplinary incident in which the Student was suspended for not reporting the incident. The father was convinced the present incident involving alcohol was similar to the previous incident. The director of student activities did indicate that if the Student had come forward in a timely fashion and reported the alcohol incident, the "reporting" would have made a difference in the way the case was handled.

Written notice of the Student's suspension was prepared by the principal and sent to the Student's mother on August 31, 1998. On that date, the school also prepared and sent to the Student's mother a case conference notification form indicating that a causal conference would be held on September 3rd at 1:00 p.m. to discuss the Student's "school behavior." The parents were present for the case conference committee meeting on September 3, 1998. The director of student activities read the charge against the Student and made it clear the subject of the meeting was to establish whether there was a relationship between drinking alcohol at school and the Student's disability. The father wanted to focus on the "non-reporting" issue. Both parents were provided a copy of the Disciplinary Referral Form and a procedural safeguards booklet. The case conference committee decided that a functional behavioral assessment (FBA) needed to be conducted to assist the committee. The September 3rd meeting was adjourned and the case conference committee meeting was rescheduled for September 14, 1998.

On September 14, 1998, the case conference committee reconvened and considered information from teachers, the parents, and the school's most recent evaluation, the FBA. The committee noted the Student's lack of disciplinary problems at school prior to the present incident. The case conference committee thoroughly discussed the Student's disability in relation to his misconduct, and determined the Student's disability did not impair his ability to control drinking alcohol on school premises. The committee determined the alleged misbehavior was not a manifestation of the Student's disability. The school has appropriately implemented the Student's IEP for the 1998-1999 school year.

Based upon the foregoing findings of fact, the IHO concluded the school properly conducted a review of the relationship between the Student's disability and the behavior subject to the disciplinary action. The IHO further concluded the school did not deny the Student due process of law in connection with the manifestation determination. The parents were provided adequate notice of the September 3, 1998, meeting. Further, any confusion over the Student's misbehavior and any alleged lack of due process afforded the parents in connection with the

September 3, 1998 meeting was nonprejudicial and cured by the fact that the actual manifestation determination was not conducted until September 14, 1998. By that date, the parents had been informed, both in writing and verbally, of the behavior charges and the subject of the manifestation determination meeting on September 14, 1998.

Based upon the above findings of fact and conclusions of law, the IHO ordered that the alleged behavior of the Student was not a manifestation of his disability. The school was therefore allowed to pursue expulsion procedures in compliance with Indiana law.

PROCEDURAL HISTORY OF THE APPEAL

On December 9, 1998, the Indiana Department of Education, on behalf of the Board of Special Education Appeals (BSEA), received the parent's pro se Petition for Review. The school timely filed its Response on December 21, 1998. The parties were notified that the BSEA would conduct its impartial review, with oral argument, on January 8, 1999.

Parents' Petition for Review

In seeking review, the parent requests the following relief: (1) a reversal of the IHO's ruling, and (2) a ruling by the BSEA that the Student was denied his due rights under Article 7 and that reasonable evidence exists to conclude that a causal relationship exists between the alleged behavior and the Student's learning disability. The parent objects specifically to Findings of Fact 12, 13, 14, 21, 23 and 27; and Conclusions of Law 1 and 2.

The parent disagrees with FF 12, stating that contrary to the finding, both the Student and another student were cooperative with the school. The parent acknowledges that FF 13 represents the opinion of the director of student activities that the Student wasn't telling the whole truth and his belief the Student knowingly consumed alcohol at school, but maintains that the Expulsion Examiner's Written Summary of Evidence proves the school had no evidence to lead to that conclusion. The parent objects to FF 14 which indicates the Student gave contradictory testimony and states the transcript misquotes the Student.

While not disagreeing with FF 21, the parent maintains that part of the finding, which stated the director of student activities indicated that timely reporting of the alcohol incident by the Student would have made a difference in the way the case was handled, is critical to the parent's contention that the parents, Student and case conference committee were not sufficiently informed of the facts surrounding the case to make an informed decision. The parent disagrees with FF 23 which indicates the principal informed the father the charge against the son was consumption of alcohol on school property. The parent maintains he was informed the charge was that the Student was "under the influence of alcohol" at school. The parent makes a similar complaint as to FF 27 which also refers to drinking alcohol at school.

Conclusion of Law No. 1 indicates the school properly conducted a review of the relationship between the Student's disability and the behavior subject to the disciplinary action in compliance with IDEA Amendments of 1997 and Article 7. The parent disagrees with this conclusion, arguing the behavior subject to disciplinary action was misrepresented to the case conference committee and the functional behavior assessment was used to address the behavior of consumption of alcohol. The parent maintains the case conference committee was not informed of the true nature of the charge and that no alcohol was involved.

The parent has similar objections to CL 2 which determined the school did not deny the Student due process of law in connection with the manifestation determination, the parents were provided adequate notice of the meetings held on September 3 and September 14, 1998, and the parents were informed both verbally and in writing, numerous times, that the school was alleging the Student possessed, used, or in other words consumed alcohol on school premises, and that this was the misbehavior that would be the subject of the manifestation determination. The parent states the parents, Student and case conference committee were misinformed as to the misbehavior charged and had they been properly informed, a relationship between the behavior and the Student's disability would have been found. Further, the parent argues that no alcohol was involved in the incident.

School's Response

On December 21, 1998, the school filed a response to the parent's petition. The school generally referred the BSEA to the Findings of Fact and Conclusions of Law. It is the position of the school that the facts and conclusions are appropriate and correct.

REVIEW BY THE BOARD OF SPECIAL EDUCATION APPEALS

The Indiana Board of Special Education Appeals scheduled oral argument for January 8, 1999, a date and time convenient to the parent, and the parties were so notified. Due to inclement weather and the forecast for additional inclement weather, the Board determined that review with oral argument could not be conducted in the manner originally considered. As a consequence of these safety-related concerns, review by oral argument was withdrawn by the Board. Review without oral argument was scheduled by the Board to be held in the offices of the Indiana Department of Education in Indianapolis, Indiana, on January 8, 1999. Severe winter weather conditions on January 8, 1999, particularly in the southern half of Indiana, precluded safe travel for the Board members. As a result, the Board rescheduled its review for January 12, 1999. The parties were notified by telephone and facsimile transmission of each rescheduling of the hearing.

On the morning of January 12, 1999, a facsimile transmission was received from the parent. There was no indication a copy of this letter was provided to the school. The Board of Special Education Appeals declined to consider any new arguments or evidence.

The Board of Special Education Appeals conducted its impartial review on January 12, 1999. All members were present and had reviewed the record, the Petition for Review and Response. The Indiana Board of Special Education Appeals now finds as follows:

Combined Findings of Fact and Conclusions of Law

1. The Indiana Board of Special Education Appeals (BSEA) has jurisdiction in the matter pursuant to 511 IAC 7-15-6.
2. The Student has been identified as eligible for special education as student with a specific learning disability in the area of written expression.
3. The School is a member of the Northeast Indiana Special Education Cooperative.
4. On August 28, 1998, the Student was involved, along with two other students, in an incident involving alcohol.
5. Mr. Johnston believed the three boys involved in the incident were not very cooperative.
6. The School convened the case conference committee on September 3, 1998, to determine whether there was a causal relationship between the Student's disability and the behavior of possession or consumption of alcohol. The September 3, 1998, conference was continued until September 14, 1998, in order to perform a functional behavior assessment.
7. The case conference committee, on September 14, 1998, determined there was not a causal relationship between the Student's disability and the behavior of possession or consumption of alcohol.
8. The School followed the required procedures pursuant to IDEA and Article 7 in conducting the manifestation determination.
9. The Independent Hearing Officer rendered his written decision on November 10, 1998.
10. On November 19, 1998, the School conducted an expulsion meeting before an expulsion examiner. As a result of this meeting, on November 24, 1998, the expulsion examiner issued a written summary of evidence recommending the Student be expelled. On December 1, 1998, the Superintendent concurred with the recommendation and determined that the expulsion be implemented forthwith.
11. 511 IAC 7-15-2(m) provides, in part, that "a request for a due process hearing under section 5 of this rule operates to stay the formal expulsion hearing until administrative and judicial proceedings are completed."
12. Although the order of the Independent Hearing Officer allowed the School to proceed with expulsion procedures in compliance with Indiana law, the expulsion of the Student prior to the completion of administrative procedures was not in compliance with Indiana law.

All votes by the BSEA regarding the above were voice votes and were unanimous.

Orders of the Indiana Board of Special Education Appeals

In consideration of the above Combined Findings of Fact and Conclusions of Law, the Indiana Board of Special Education Appeals now holds:

1. All references in the Independent Hearing Officer's decision to "Northwest Indiana Special Education Cooperative" are changed to "Northeast Indiana Special Education Cooperative."

2. Finding of Fact No. 12 is amended to read as follows:

According to Mr. Johnston, the three boys implicated in the August 28th alcohol incident were not very cooperative with Mr. Johnston.

3. The last sentence in Finding of Fact No. 20 is amended to read as follows:

The Student's father became very angry at this meeting and was subsequently asked to leave.

4. Findings of Fact 13, 14, 21, 23 and 27 are upheld as written.

5. Conclusions of Law 1 and 2 are upheld as written.

6. The School shall provide inservice training to all administrators who are or may be involved in the discipline, suspension and expulsion of special education students concerning the requirements of Article 7 and IDEA in matters pertaining to suspension and expulsions. Documentation of the inservice training, including the date of the training, a listing by name and position of those trained, and an agenda of topics covered, shall be provided to the Division of Special Education no later than the end of the 1998-1999 school year.

7. The decision of the IHO is upheld in all other respects.

8. All other Motions not specifically addressed herein are hereby deemed denied.

Date: January 12, 1999

/s/ Richard Therrien
Richard Therrien, Chair
Board of Special Education Appeals

Appeal Right

Any party aggrieved by the written decision of the Indiana Board of Special Education Appeals has thirty (30) calendar days from receipt of this decision to request judicial appeal from a civil court with jurisdiction, as provided by I.C. 4-21.5-5-5 and 511 IAC 7-15-6(p).